68727-1 68727-1

NO. 68727-1-I

Whatcom County No. 10-2-03030-8

---

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

---

ROBERT K. HALL, a single man and DAYLIGHT PROPERTIES, LLC, a Washington limited liability company,

Respondents/Cross Appellants,

v.

MATTHEW FEIGENBAUM,

Appellant/Cross Respondent.

---

# APPELLANT FEIGENBAUM'S APPEAL BRIEF

---

BROWNLIE EVANS WOLF & LEE, LLP

MURPHY EVANS
WSBA #26293
230 E. Champion Street
Bellingham, WA 98225
360-676-0306
Attorney for Appellant



ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

CASES *(cont.)*

TABLE OF AUTHORITIES

CASES *(cont.)*



STATUTES

TABLE OF AUTHORITIES

STATUTES *(cont.)*



OTHER AUTHORITIES

TABLE OF AUTHORITIES

OTHER AUTHORITIES *(cont.)*

## I. INTRODUCTION

In 2003, Matthew Feigenbaum invested hundreds of thousands of dollars to convert an unfinished basement in a building owned by Robert Hall and Daylight Properties LLC into a state-of the-art nightclub, the Nightlight Lounge. Feigenbaum operated the Nightlight until 2010. In 2010, he closed the business while he attempted to sell it. Under the terms of his lease, Feigenbaum was entitled to remove virtually all of the furniture, equipment, fixtures and improvements he installed at the premises – including even the HVAC system – upon termination of the lease.

After Feigenbaum missed lease payments for the months of September and October 2010, Robert Hall and Daylight Properties (collectively "Hall") instituted unlawful detainer proceedings. However, rather than following the letter of the law, Hall pursued an aggressive and illegal course of action that was designed to prevent Feigenbaum from either preserving his lease rights or removing his property from the premises should the lease be terminated.

- Hall used a 3-Day Notice to Pay or Vacate even though the lease required a 20-day notice;
- Hall made no effort to serve Feigenbaum at his home and only mailed and posted the 3-Day Notice to the commercial premises, even though he knew the business was closed;
- At the outset of the case, Hall secured a TRO without any notice to Feigenbaum that prevented Feigenbaum from removing his

property from the premises. The TRO was issued without posting any bond;

- Hall secured an order authorizing service of the Eviction Summons and Complaint by mail before making a diligent search and without any showing that Feigenbaum was evading service or had fled the state;
- Hall did not give Feigenbaum the notice required by RCW 59.12.070 of the show cause hearing for the Writ of Restitution;
- Hall secured the Writ of Restitution ex parte, without a bond;
- Hall and the sheriff made no effort to personally serve the Writ of Restitution on Feigenbaum;
- Hall secured an Order of Default and Default Judgment even though Feigenbaum had appeared, answered, and was not in default, CP 818-821.
- Hall forced Feigenbaum to bid $60,001.00 at the sheriff's sale to preserve his property (CP 976-987) even though the amount of the judgment was only $45,131 (CP 1019-1021) and the Writ of Execution stated that only $47,051 was owed (CP 995-997). Although Feigenbaum was the high bidder, Hall refused to release the property to Feigenbaum;
- After re-letting the premises with much of Feigenbaum's furniture, fixture and equipment still in place, Hall opposed an order requiring him to return Feigenbaum's property by taking positions that were contrary to the parties' lease and contrary to Washington law. CP 400-03, 06-15, 18-24, 430-35, 451-56, 507-18, 1190-91.

Feigenbaum now asks this court to reverse the trial court, rule that the trial court lacked personal jurisdiction and was precluded from exercising its subject matter jurisdiction, vacate the judgment, award him the costs and attorney's fees of this appeal, and remand to the trial court for an award of costs, reasonable attorney's fees and damages associated with the wrongful issuance of a TRO, wrongful issuance of a preliminary injunction, and wrongful issuance of a writ of restitution.

## II. ASSIGNMENTS OF ERROR

1. Hall made no effort to serve or mail the 3-Day Notice to Pay or Vacate to Feigenbaum's residence and only (1) posted the Notice at the premises unlawfully held and (2) mailed the Notice to the premises. This did not strictly comply with the requirements of RCW 59.12.040. The court erred when it denied Feigenbaum's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

2. The parties' commercial lease required Hall to give Feigenbaum 20 days' notice of any default. Hall only attempted to serve Feigenbaum with a 3-Day Notice. The court erred when it denied Feigenbaum's Motion to Dismiss for Lack of Personal and Subject Matter Jurisdiction.

3. On December 1, 2010, the court commissioner issued an ex parte temporary restraining order (TRO) without any showing of immediate or irreparable harm, without any showing of efforts to notify Feigenbaum of the hearing or of the existence of exigent circumstances, and without any requirement of a bond. The TRO set the show cause hearing on the preliminary injunction for December 17, 2010 – sixteen days later. This violated CR 65(b), RCW 7.40.050, RCW 7.40.080, and Feigenbaum's due process rights under the fourteenth amendment of the United States Constitution and article 1, section 3 of the Washington state constitution. This also exceeded the court's limited authority under the unlawful detainer statute.

4. On December 6, the court commissioner authorized service of the Eviction Summons and Complaint by mailing and posting even though there was no evidence that Feigenbaum had left the state, was evading service, and even though the showing of a diligent search was inadequate. This violated CR 4(d)(4) and RCW 4.28.100(2).

5. Service by mail was ineffective because the form of the mailed Eviction Summons did not comply with CR 4(d)(4), the mailed Eviction Summons did not give Feigenbaum 90 days to appear (CR 4(d)(4)), and Hall never attempted to leave a copy of the Eviction Summons at Feigenbaum's usual mailing address after securing the Order Allowing Service by Mail. RCW 4.28.080(16).

6. The Eviction Summons contained a return date of 5 p.m. on December 16, 2010. RCW 59.12.070 requires the return date to be not less than seven nor more than thirty days from the date of service of the summons. Because the Eviction Summons was mailed, the return date had to be not less than ten days before the date of service. CR 6(e). Hall mailed the Eviction Summons on December 6. Under RCW 4.28.080(16), service of the mailed Summons was not complete until ten days later – on December 16, the same date as the return date. This did not provide Feigenbaum the required ten days' notice. The court erred when it denied Feigenbaum's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

7. On December 22, 2010, the court entered a preliminary injunction even though the TRO had expired on December 15 (CR 65(b)). The court did not require Hall to post a bond as a condition of the preliminary injunction. This violated RCW 7.40.080. This also exceeded the court's limited authority under the unlawful detainer statute.

8. On January 7, 2011, Hall appeared ex parte before the trial judge and secured a Writ of Restitution without notice to Feigenbaum. The court did not require Hall to post a bond as a condition of the Writ of Restitution. This violated RCW 59.12.090, CR 5, CR 6(d), and Feigenbaum's due process rights under the federal and state constitutions.

9. The court erred when the court ruled that the unlawful detainer proceeding automatically converted to an ordinary civil action once the writ of restitution issued.

10. Hall evicted Feigenbaum and regained possession of the premises on January 7, 2011, pursuant to the Writ of Restitution. On April 13, 2012, the court awarded damages of $129,985 based on unpaid rent covering the time period after Hall terminated the lease and regained possession of the premises and up until the end of the lease term on August 31, 2013. This violated RCW 59.12.170 and exceeded Hall's contractual rights.

11. The court erred in awarding Hall the cost of mitigating his damages. Such costs are not recoverable in an unlawful detainer proceeding. RCW 59.12.170.

12. The court erred in awarding Hall judgment, costs and attorney's fees. The Appeals Court should award costs and attorney's fees to Feigenbaum.

## III. STATEMENT OF THE CASE

Beginning in 2003, Matthew Feigenbaum leased premises in Bellingham from Robert Hall and Daylight Properties LLC for the operation of a nightclub, the Nightlight Lounge. Before Feigenbaum took possession of the premises, the premises were largely unfinished and had been used as a storage facility for a thrift store. CP 546-51. Feigenbaum invested substantial funds to improve the premises and to make them suitable for his purposes. To protect that investment, Feigenbaum negotiated paragraph 11 of the lease, which specifically provided that the furniture, fixtures and equipment installed by him remained Feigenbaum's personal property and upon termination of the lease, Feigenbaum would be entitled to remove same. CP 1167-75, 546-51, and 494-506.

During 2010, Feigenbaum ceased operating the Nightlight and actively attempted to sell the business, listing the business with a broker that Hall had recommended to him. CP 1106-10. After Feigenbaum missed rent payments for the months of September and October, Hall attempted to serve him with a 3-Day Notice to Pay Rent or Vacate on November 5, 2010. Hall's attempted service of the 3-Day Notice violated

paragraph 21 of the lease, which provided for 20-day notice. CP 1167-75. At the time of the 3-Day Notice, Feigenbaum remained in possession of the premises but was no longer operating his business. CP 1153-57 and 1106-10. At the time, Feigenbaum had the business listed for sale with a broker and was actively attempting to sell the business. CP 1109. Hall knew Feigenbaum was attempting to sell the business. *Id.* Hall also knew Feigenbaum did not receive mail at the premises, and Feigenbaum had directed Hall to send all correspondence to his home address. CP 1008-09. Despite this, Hall made no effort to serve the 3-Day Notice on Feigenbaum at his residence, and Hall did not mail the 3-Day Notice to Feigenbaum at his residence. CP 1178. Instead, Hall only posted the notice on the door to the Nightlight and mailed the notice to Feigenbaum at the Nightlight address. CP 1176-78.

On December 1, 2010, Hall appeared ex parte before a Whatcom County Superior Court commissioner to request a temporary restraining order barring Feigenbaum from moving, selling or otherwise disposing of any of his personal property located at the Nightlight Lounge. CP 1142-44. Hall's only purported showing of "immediate and irreparable injury" in support of the TRO was the landlord's self-serving statement, "I am concerned that Defendants may remove some or all of the personal property located in the Premises." CP 1154. Hall's counsel used this

same statement as justification for not providing Feigenbaum with *any* notice of the hearing. CP 1151-52. The court commissioner granted the TRO *ex parte.* The commissioner's TRO (1) did not require Hall to post any bond, (2) failed to define any injury or explain why such injury was "irreparable", and (3) set a December 17 (16 days later) show cause hearing for a preliminary injunction. CP 1142-44.

At the same *ex parte* hearing on December 1, 2010, Hall secured a show cause order for a hearing on December 17, to determine whether a writ of restitution should issue. CP 1138-39. Contemporaneous with the filing of the show cause order and the pleadings associated with the TRO, Hall filed his Eviction Summons (CP 1181-83) and Complaint for Unlawful Detainer (CP 1158-80). The Eviction Summons contained a return date of 5:00 p.m. on December 16, 2010. CP 1181-83.

During a 44-hour period – from 2:03 p.m. on December 1 to 10:26 a.m. on Friday, December 3 – Hall's process servers made six (6) unsuccessful attempts to serve Feigenbaum at his home. CP 1126-37. As discussed below, the Declarations of Attempted Service fail to establish that Hall conducted a diligent search for Feigenbaum or that Feigenbaum had either left the state or was attempting to evade service.

On December 6, 2011, Hall again appeared on the *ex parte* calendar and moved for an order authorizing him to serve the summons

and complaint by mail and by posting. CP 1124-25. The commissioner granted the motion and signed the proposed order. The *ex parte* Order Allowing Service by Mailing and Posting did not change the December 16, 2010, return date in the Eviction Summons or the December 17 show cause hearing date for the Writ of Restitution. CP 1119-1120. Hall's Declaration of Mailing states that the summons, complaint, TRO, and show cause pleadings were mailed to Feigenbaum at his residence – 2101 Young Street, Bellingham – on December 6, 2010. CP 1116-18.

On December 17, 2010, Feigenbaum made a limited appearance *pro se* at the show cause hearing and objected to the court's jurisdiction to hear the case. Specifically, Feigenbaum objected that the court lacked personal jurisdiction because the Eviction Summons and Complaint for Unlawful Detainer were improperly served by mail. VRP (December 17, 2010) at 3-5. The court did not rule on Feigenbaum's jurisdictional objection; instead, the court ordered Feigenbaum to pay a sanction of $250 and set the matter over for a hearing on December 22, 2010. *Id.* at 8-9.

At the December 22, 2010 hearing, Feigenbaum appeared *pro se* and renewed his objection to the order authorizing service by mail and the court's personal jurisdiction. CP 1111-13 and VRP (December 22, 2010) at 5-15. The court did not rule on Feigenbaum's jurisdictional

objection but set the matter over for another hearing on January 21, 2011. *Id.* at 29-30. In the meantime, the court ordered Feigenbaum to pay $14,400 into the court's registry to cover back rent, and ordered Feigenbaum to pay all future rent into the court's registry. *Id.* at 21. The court also granted Hall's Motion for a Preliminary Injunction forbidding Feigenbaum from removing his personal property from the premises. The court's injunction did not require Hall to post a bond or any security. CP 1102-03.

On January 7, 2011, Hall appeared *ex parte* before Judge Mura and secured an order for issuance of the Writ of Restitution ("Writ"). CP 1092-95. No declaration or motion was filed in support of the entry of the Writ. No testimony was introduced to establish that rent was due and had not been paid into the court's registry. The order did not require Hall to post a bond as a condition for issuance of the Writ. The Writ of Restitution was issued without any bond being posted. CP 1092-95.

On January 21, 2012, the court denied Feigenbaum's Motion to Dismiss for Lack of Personal Jurisdiction, refused to vacate the Writ of Restitution, and ordered that $12,700 held in the court's registry be released to Hall. CP 1071-79 and VRP (January 21, 2011) at 21-23. The court set the remaining issues for trial. *Id.* at 25-26. On February 7, 2011,

the court entered discovery and trial setting orders. CP 1059-62. Trial was set for March 17, 2011.

On March 4, 2011, the court entered an Order of Default against Feigenbaum. CP 1036-1037. On March 14, the court entered a Default Judgment against Feigenbaum in the amount of $45,131.95. CP 1019-21.

On March 15, Feigenbaum moved to dismiss for lack of subject matter jurisdiction and moved for an order requiring Hall to post bonds for the Writ of Restitution and Preliminary Injunction. CP 1011-18.

On April 1, Hall secured a Writ of Execution on Feigenbaum's personal property that was still being held by Hall at the Nightlight premises pursuant to the preliminary injunction issued on December 22, 2010. CP 995-97.

On April 22, 2011, the court denied Feigenbaum's motion to dismiss for lack of subject matter jurisdiction and to require Hall to post a bond as security for the court's Preliminary Injunction and Writ of Restitution. As part of its order denying the motions, the court awarded sanctions of $600 against Feigenbaum for Hall's reasonable attorney's fees in responding to the motions. CP 990-91.

On May 26, the Whatcom County Sheriff's Department conducted a sheriff's sale of Feigenbaum's personal property. Although the amount of the Default Judgment was $45,131.95, Feigenbaum was

required to bid up to $60,001.00 at the sheriff's sale before the sheriff's sale was concluded. Feigenbaum delivered these funds to the sheriff's department and the funds were deposited into the court's registry. CP 976-87. For reasons that are unexplained, the sheriff reported a deficiency of $15,519.49. CP 976-87.

On June 6, Murphy Evans appeared on behalf of Feigenbaum. CP 988. On June 8, Feigenbaum brought a motion to vacate the Default Judgment, to vacate the Writ of Restitution and to dismiss for lack of personal jurisdiction and lack of subject matter jurisdiction. CP 963-975.

On June 24, the court vacated the Default Judgment. This ruling has not been appealed. On June 24, the court reserved ruling on Feigenbaum's motions to vacate the Writ of Restitution and to dismiss for lack of personal jurisdiction and lack of subject matter jurisdiction. CP 818-21 and VRP (June 24, 2011) at 15.

On August 12, the court denied Feigenbaum's motion to vacate the Writ of Restitution and dismiss for lack of subject matter and personal jurisdiction. VRP (August 12, 2011) at 19-20. The order denying Feigenbaum's motion was entered on September 1, 2011. CP 760-71.
The court certified the jurisdictional issues for immediate review by the Court of Appeals and stayed further proceedings in the trial court pending that review. CP 1069-70.

Feigenbaum filed a motion for discretionary review with the Court of Appeals, Division One. That motion was denied by the commissioner on December 14, 2011. Feigenbaum's motion to modify the commissioner's ruling was denied on March 14, 2012.

On January 9, 2012, Feigenbaum requested an order from the trial court clarifying whether the court had converted the unlawful detainer proceedings into an ordinary civil action. CP 377-83. Feigenbaum took the position that the case had not been converted, because no party had requested the conversion, no order had been entered, and Feigenbaum had not conceded the right to possession of the premises. CP 377-83. Feigenbaum requested the clarification because of conflicting statements made by the court. CP 324-28. On February 10, 2012, the court entered an order stating that the case had been converted to a civil action. CP 257-59.

On April 13, 2012, the court entered the Order on Summary Judgment and awarded Hall judgment in the amount of $136,809.29. CP 1188-1193. Of this amount $129,985 was for rent allegedly owed for the time period after January 7, 2011 (when Feigenbaum was evicted from the premises pursuant to the Writ of Restitution) and up until the end of the lease term on August 31, 2013, and $6,822.29 was for the cost of re-letting the premises. CP 141-44.

On July 2, 2012, the court awarded Hall costs and reasonable attorney's fees totaling $43,000, and entered a Final Judgment in a total amount of $179,807.29. CP 1188-93.

## IV. ARGUMENT

In unlawful detainer proceedings, noncompliance with the notice requirements set forth in RCW 59.12. *et seq.* either deprives the court of subject matter jurisdiction or precludes the court from exercising subject matter jurisdiction. Christensen v. Ellsworth, 162 Wn.2d 365, 372 (2007); Truly v. Heuft, 138 Wn.App. 913, 918 (2007); Housing Authority of City of Seattle v. Bin, 163 Wn.App. 367, 375 (2011). Time and manner requirements of service in the unlawful detainer statutes are to be strictly enforced in favor of the tenant. Truly, at 921-22.

### 1. The trial court erred when it ruled that posting and mailing the 3-Day Notice to Pay or Vacate to the premises unlawfully held is alone sufficient to satisfy the notice requirements of RCW 59.12.040.

At the time of the unlawful detainer action, the Nightlight had been closed for several months and was up for sale. Curiously, Hall made no effort to serve Feigenbaum with the 3-Day Notice to Pay or Vacate at his residence; instead, Hall chose only to post the 3-Day Notice at the Nightlight and to mail the 3-Day Notice to the Nightlight.

RCW 59.12.040 provides three alternative methods for serving the 3-Day Notice to Pay or Vacate. It is undisputed that Hall attempted to

serve the 3-Day Notice pursuant to the third alternative, which states (with emphasis added):

> or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his or her place of residence is not known, or if a person of suitable age and discretion **there** cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person **there residing**, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated.

It is undisputed that Hall knew Feigenbaum's home address. CP 1008-09, 16-18, 36-37. Nevertheless, Hall neither attempted to serve the 3-Day Notice on Feigenbaum at his home nor mailed a copy of the 3-Day Notice to Feigenbaum's home. Moreover, Hall knew that Feigenbaum did not receive mail at the Nightlight premises. CP 1008-09. Whether such service strictly complied with RCW 59.12.040 depends on the meaning of the highlighted "there" and "there residing" in the statute. If, as Feigenbaum argues, either of these terms refers to Feigenbaum's home address, then Hall's service of the 3-Day Notice did not strictly comply with RCW 59.12.040, and the trial court was precluded from exercising its subject matter jurisdiction. Christensen, *supra,* at 372.

Because this issue involves the court's subject matter jurisdiction, it is reviewed *de novo*.

**2. Hall did not strictly comply with RCW 59.12.030, because he served Feigenbaum with a 3-Day Notice to Pay or Vacate rather than the 20-Day Notice required by the parties' lease. Therefore, the trial court was precluded from exercising its subject matter jurisdiction**

**and lacked personal jurisdiction over the unlawful detainer proceeding.**

Under Washington law, if a parties' commercial lease provides for a 20-day notice period for any default in the lease, the landlord must give the tenant 20 days' notice before filing an unlawful detainer action. Community Investments Ltd. v. Safeway Stores, Inc., 36 Wn.App 34 (1983). In Community Investments the landlord initially served the tenant with a 20-Day Notice (per the lease) and later served the tenant with a 10-Day Notice (as per RCW 59.12.030(4)). The court ruled that the lease trumped the statute and required the landlord to provide a 20-Day Notice before commencing an unlawful detainer action; because the landlord filed the suit only 19 days after the 20-Day Notice was served, he failed to strictly comply with the notice requirements of the statute and the trial court never obtained personal or subject matter jurisdiction. Id. at 38.

In this case, the parties' lease required Hall to give Feigenbaum twenty (20) days written notice of any default under the lease (CP 1171), but instead of serving Feigenbaum with a 20-Day Notice (per the lease), Hall attempted to serve Feigenbaum with a 3-Day Notice (per RCW 59.12.030(3)). Because Hall did not provide Feigenbaum with the proper form of the pre-litigation notice, the trial court never obtained personal or

subject matter jurisdiction over the unlawful detainer proceeding. Id. at 37-38 ("The provisions governing the time and manner of bringing an unlawful detainer action are to be strictly construed.") The improper notice also meant the trial court lacked personal jurisdiction over Feigenbaum. Id at 38 (citing Sowers v. Lewis, 49 Wash.2d 891 (1957); Little v. Catania, 48 Wash.2d 890 (1956)).

Because this issue involves both the court's subject matter and personal jurisdiction, it is reviewed *de novo*.

**3. The issuance of the TRO was error.**

**a. The trial court lacked authority under the unlawful detainer statute to issue a TRO.**

Unlawful detainer actions are determined by a summary proceeding, limited to the narrow question of possession and related issues such as restitution of the premises and rent. First Union Management, Inc. v. Slack, 36 Wn.App. 849, 679 P.2d 936 (1984). In order to protect the summary nature of the unlawful detainer proceedings, other claims are generally not allowed. Granat v. Keasler, 99 Wn.2d 564, 570, 663 P.2d 830 (1983). Hall's TRO did not address the right to possession of the premises; instead, Hall's TRO was directed toward the possession and control over Feigenbaum's personal property. As such, it was beyond the scope of the court's limited authority and was wrongful.

Because this issue involves the court's exercise of its subject matter jurisdiction, it is reviewed *de novo*.

**b. The TRO was wrongful because Hall made no effort to notify Feigenbaum of the hearing, made no showing of immediate and irreparable injury, and posted no bond.**

Even if this court finds that the trial court had authority to issue the TRO, the issuance was wrongful. Hall appeared *ex parte* before a Whatcom County Superior Court commissioner and secured a TRO barring Feigenbaum from "removing, assigning, selling, or otherwise disposing [of] in any manner" his personal property located at the Nightlight Lounge. CP 1142-44. The court commissioner granted the TRO *ex parte* and without notice to Feigenbaum. Hall made no showing (1) that Hall would suffer "immediate and irreparable injury" if the TRO were not issued, or (2) that an emergency existed; moreover, the commissioner's TRO (3) did not require Hall to post any bond, (4) failed to define any injury or explain why such injury was "irreparable", and (5) set a December 17 (16 days later) show cause hearing for a preliminary injunction. In all five respects, the TRO violated CR 65(b), RCW 7.40.050[1] and .080.

---

[1] **7.40.050. Notice--Restraining orders in emergencies**

No injunction shall be granted until it shall appear to the court or judge granting it, that some one or more of the opposite party concerned, has had reasonable notice of the time and place of making application, except that in cases of emergency to be shown in the

Hall's only purported showing of "immediate and irreparable injury" were the landlord's self-serving statements:

> 6. . . . I am concerned that Defendants may remove some or all of the personal property located in the Premises. When responding to discussions about default under the Lease, Defendant Matthew Feigenbaum made statements to me on previous occasions to the effect that, "You don't want me to leave and tear all my improvements out."
>
> 7. . . . I believe that when served this action, Mr. Feigenbaum will attempt to remove the improvements and fixtures from the Premises in order to avoid paying the obligations due under the Lease. Although the Defendants' business is not currently operating, all the personal property is for use at the Premises and restricting its removal would not affect the Defendants use of the property on site. Since it appears the Premises is abandoned, I believe it is in the best interest of all parties to secure the property, as I cannot possibly know who is currently in possession of keys.

CP 1154-55. This, however, cannot constitute "immediate and irreparable injury" because the personal property and improvements belonged to Feigenbaum and the Lease entitled him to remove them at the end of the term. CP 1169, CP 1190-91.

Hall's counsel used these same statements as justification for not providing Feigenbaum with *any* notice of the hearing. CP 1151-52. Even if the court were to find that Kane Hall's statements establish the likelihood of "immediate harm," it cannot find that the same statement also dispenses with the requirement of attempting to provide notice of the TRO to Feigenbaum. In Corning & Sons v. McNamara, 8 Wn.App 441

---

complaint, the court may grant a restraining order until notice can be given and hearing had thereon.

(1973), a landlord suing for breach of a farm lease secured a TRO without notice that barred the tenant from removing harvested hay and harvesting equipment from the premises. Id. at 442. The hay and the equipment belonged to the tenant. The landlord's complaint included an allegation of irreparable injury (Id. at 444) but only sought money damages for breach of the lease. Id. at 442. The Corning court held that the issuance of the TRO without notice violated RCW 7.40.050, article 1, section 3 of the Washington State Constitution, and the due process clause of the fourteenth amendment to the United States Constitution, because the landlord failed to make an adequate showing of the existence of an emergency or extraordinary situation. Id. at 445.[2]

Here, Hall's Complaint for Unlawful Detainer made no allegation of an emergency or immediate and irreparable injury; it only sought termination of the lease; issuance of a Writ of Restitution, an order preventing the removal of personal property; money damages, and a landlord's lien. CP 1162-63. Moreover, Hall's alleged concern that

[2] The TRO not only enjoined Feigenbaum from removing or disposing of his personal property but also authorized Hall "to secure the Premises." CP 1142-44. In his motion for the TRO, Kane Hall testified, "Since it appears the Premises is abandoned, I believe it in the best interests of all parties to secure the property, as I cannot possibly know who is currently in possession of keys." CP 1155. Although the record is unclear on whether Hall in fact changed the locks to the premises after securing the TRO, the prohibition on Feigenbaum's removal of his personal property had the effect – if not the legal meaning – of a prejudgment writ of attachment without notice and without bond. Such prejudgment writs are unconstitutional. See, e.g., Connecticut v. Doehr 501 U.S. 1, 12 (1991); Sniadach v. Family Finance Corp. of Bay View 395 U.S. 337, 342 (1969).

Feigenbaum might remove property from the premises does not constitute an emergency because the property belonged to Feigenbaum, the lease permitted him to remove the property, and there was no allegation that any steps had been taken to begin removing the property. CP 1169, CP 1190-91.

Finally, the court's TRO did not require Hall to post any bond,[3] failed to define any injury or explain an "irreparable harm," and set a December 17 (16 days later) show cause hearing for a preliminary injunction. CP 1142-44. As such, the TRO violated CR 65(b), CR 65(c), and RCW 7.40.080.

The issuance of a TRO is reviewed for abuse of discretion. The trial court abused its discretion when it violated the state and federal constitutions, RCW 7.40.050 and .080 and CR 65 by issuing the TRO without notice to Feigenbaum, without any showing of emergency or immediate and irreparable harm, and without requiring Hall to post a bond.

This court should rule that the TRO was wrongful. The court should award Feigenbaum reasonable attorney's fees associated with this ruling on appeal. Cornell Pump Co. v. City of Bellingham, 123 Wn.App.

[3] Ironically, Hall argued that no bond should be required because the TRO would protect Feigenbaum's property and would not impose any economic hardship because Feigenbaum's business was not operating. CP 1149.

226, 232 (2004). The court should remand to the trial court for the determination of an award of damages suffered by Feigenbaum as a result of the TRO and an award of reasonable attorney's fees associated with the trial court proceedings. CR 65(c).

**4. The Order Allowing Service by Mailing and Posting was error.**

**a. Hall made no diligent search for Feigenbaum.**

Hall made six (6) attempts to personally serve Feigenbaum at his single-family home before seeking an order authorizing service by mail. All of these attempts took place within a 44-hour period. The process servers' Declarations of Attempted Service establish the following:

- Feigenbaum's house was occupied.
- Feigenbaum's vehicle was sometimes present and sometimes not;
- A dog was sometimes inside the house and sometimes not;
- Lights inside the house were sometimes on and sometimes not;
- No attempt was made to stake out the house or wait for Feigenbaum to return;
- No attempt was made to contact Feigenbaum's friends or associates;
- No attempt was made to locate Feigenbaum at the premises unlawfully held or elsewhere;
- No attempt was made to contact Feigenbaum by phone.

CP 1126-37. Taken together, the process servers' declarations established that Feigenbaum had not left the state, still resided at the house, and simply was not home when the process servers drove by. At the very least, the process servers should have waited at the house or

attempted to locate Feigenbaum elsewhere – such as his place of business or through known associates. Under these circumstances, six attempts within a 44-hour period do not constitute the "diligent search" required by CR 4(d)(4) and RCW 4.28.100(2).[4] Pascua v. Heil, 126 Wn.App 520, 528 (2005).

**b. Hall made no showing that Feigenbaum had left the state or had attempted to conceal himself.**

Even if the court were to find that Hall made a "diligent search," it cannot find that Feigenbaum tried to conceal himself to avoid service of process. During the 44 hours that Hall attempted service, no person was observed inside the house, and no person was observed fleeing the house. The process servers' testimony clearly indicates that Feigenbaum was still living at the house and simply was not at home. Absent sufficient evidence that Feigenbaum was evading service, Hall was not entitled to

---

[4] **4.28.100. Service of summons by publication--When authorized**

When the defendant cannot be found within the state, and upon the filing of an affidavit of the plaintiff, his or her agent, or attorney, with the clerk of the court, stating that he or she believes that the defendant is not a resident of the state, or cannot be found therein, and that he or she has deposited a copy of the summons (substantially in the form prescribed in RCW 4.28.110) and complaint in the post office, directed to the defendant at his or her place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his or her attorney in any of the following cases: . . .

(2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his or her creditors, or to avoid the service of a summons, or keeps himself or herself concealed therein with like intent;

an order authorizing service by mail. Charboneau Excavating, Inc. v. Turnipseed, 118 Wn.App. 358 (2003).

Questions or proper service of process are reviewed de novo. Pascua at 527.

**5. Service of the Eviction Summons by mail was ineffective.**

**a. The form of the mailed Eviction Summons did not conform with CR 4(d)(4).**

Hall made six unsuccessful attempts to serve Feigenbaum in person and then secured an Order Allowing Service by Mailing and Posting. But instead of preparing a new form of the Eviction Summons for mailing, Hall used the same form that they had attempted to serve in person. CP 1116-18, 81-83.

CR 4(d)(4) requires the following language be included in any mailed summons:

> The [mailed] summons shall contain the date it was deposited in the mail and shall require Feigenbaum to appear and answer the complaint within 90 days from the same of mailing.

Hall's mailed Eviction Summons did not state when it was mailed to Feigenbaum. The mailed Eviction Summons did not state that Feigenbaum had 90 days to answer. Because the form of the mailed Summons did not comply with the requirements of CR 4(d)(4), the mailed Summons failed to confer personal jurisdiction over Feigenbaum.

See, e.g., Worthington v. La Violette, 60 Wash. 525 (1910) and Dolan v. Jones, 37 Wash. 176 (1905).

In the context of an unlawful detainer proceeding, the trial court is also deprived of subject matter jurisdiction if the form of the Summons does not comply with the requirements of the statute. Sprincin King Street Partners v. Sound Conditioning Club, Inc., 84 Wn.App. 56, 63 (1996). Because the Summons utilized by Hall contained neither the date of mailing nor the correct date that the response was due, it did not substantially comply with the requirements of RCW 59.12.070, .080 and CR 4(d)(4), and the trial court was deprived of subject matter jurisdiction.

**b. The mailed Eviction Summons did not give Feigenbaum 90 days to appear and answer as required by CR 4(d)(4).**

Hall chose to serve Feigenbaum by mail and mailed the Evictions Summons and Complaint for Unlawful Detainer on December 6, 2010. CP 1116-18. Under CR 4(d)(4) a defendant who receives a mailed summons has ninety (90) days from the date of mailing to respond – or, in this case, until March 6, 2011. The Eviction Summons required Feigenbaum to respond by December 16, 2010 – only ten (10) days after the date of mailing. CP 1181-1183.

Under RCW 59.12.180, the civil rules apply to unlawful detainer proceedings, except as otherwise provided by the unlawful detainer

statutes.[5] In cases of service by publication, RCW 59.12.070[6] gives a judge specific authority to set a return date that is less than the sixty days after the date of publication provided by RCW 4.28.110 — so long as the service by publication is at least five days before the return date.[7] Nothing in RCW 59.12.070 gives a judge authority to set a return date that is less than the 90 days provided by CR 4(d)(4). RCW 59.12.080 does not specifically provide for service by mail. Moreover, nothing in the Order Allowing Service by Mailing and Posting entered in this case authorized a shorter time to appear and answer than the ninety days required by CR 4(d)(4). CP 1119-20.

Noncompliance with the statutory method of process prevents the trial court from acquiring subject matter jurisdiction over the unlawful

---

[5] **59.12.180. Rules of practice**
Except as otherwise provided in this chapter, the provisions of the laws of this state with reference to practice in civil actions are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter; and the provisions of such laws relative to new trials and appeals, except so far as they are inconsistent with the provisions of this chapter, shall be held to apply to the proceedings mentioned in this chapter.

[6] **59.12.070. Complaint--Summons**
. . . A summons must be issued as in other cases, returnable at a day designated therein, which shall not be less than seven nor more than thirty days from the date of service, except in cases where the publication of summons is necessary, in which case the court or judge thereof may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed.

[7] **59.12.080. Summons--Contents--Service**
. . . The summons must be directed to the defendant, and in case of summons by publication, be served at least five days before the return day designated therein. The summons must be served and returned in the same manner as summons in other actions is served and returned.

detainer proceeding. Christensen v. Ellsworth, 162 Wn.2d 365, 372 (2007); Truly v. Heuft, 138 Wn.App. 913, 918 (2007). Time and manner requirements in the unlawful detainer statute relating to service of the summons are to be strictly enforced in favor of the tenant. Id. at 921-22. Because the return date in the mailed Eviction Summons was less than the ninety days provided by CR 4(d)(4), the trial court lacked subject matter jurisdiction.[8]

Because this issue involves the court's subject matter jurisdiction and service of process, it is reviewed *de novo*.

**c. Service by mail was ineffective because Hall never attempted to leave a copy of the Eviction Summons with a person of suitable age after securing the order authorizing service by mail.**

In addition to CR 4(d)(4), RCW 4.28.080(16) sets forth requirements for effecting service by mail. It states (with emphasis added):

> **4.28.080. Summons, how served**
> (16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: **By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a**

[8] No recorded decision has determined how the time to answer a mailed summons provided by CR 4(d)(4) (90 days) can be reconciled with the requirements of RCW 59.12.070 that the eviction summons' return date "shall not be less than seven nor more than thirty days from the date of service." It may be that an eviction summons cannot be served by mail but must either be served in person or by publication (not mail), as provided by RCW 59.12.070.

> **resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address.** For the purposes of this subsection, "usual mailing address" does not include a United States postal service post office box or the person's place of employment.

Hall only mailed a copy of the Eviction Summons to Feigenbaum at his residence and the Nightlight premises and did not make any attempt to serve the Summons "on a person of suitable age and discretion at Feigenbaum's usual mailing address" after the court had authorized service by mail.[9] CP 1116-18. Because Hall's attempted service by mail did not comply with RCW 4.28.080(16), the court lacked personal and subject matter jurisdiction over the proceedings.

Because this issue involves the court's personal and subject matter jurisdiction, it is reviewed *de novo*.

**6. Even if the court rules that Hall's mailed Eviction Summons did not have to give Feigenbaum ninety days to answer (CR 4(d)(4)), Hall's service of the mailed Eviction Summons did not give Feigenbaum the notice required by RCW 59.12.070 and CR 6(e).**

RCW 59.12.070 requires that the summons in an unlawful detainer action contain a return date that "shall not be less than seven nor more than thirty days from the date of service" of the summons.[10]

---

[9] Hall also posted the summons and complaint at Feigenbaum's residence and the Nightlight premises pursuant to the court's order authorizing service by mail and posting. CP 1114-15, 1119-1120. While the unlawful detainer statute authorizes service of the 3-Day Notice to Pay or Vacate by posting (RCW 59.12.040), it does not authorize service by posting of the summons and complaint. RCW 59.12.080.

[10] **59.12.070. Complaint--Summons**
The plaintiff in his or her complaint, which shall be in writing, must set forth the facts

Because Hall mailed the Eviction Summons and Complaint for Unlawful Detainer to Feigenbaum, Hall was required to give him an additional three days – or at least 10 days' notice of the return date. CR 6(e)[11]. The return date in Hall's Eviction Summons was December 16. Therefore, Hall was required to serve the Summons and Complaint no later than December 6. In this case, Hall mailed the Eviction Summons on December 6; the question, then, is whether Feigenbaum was served on December 6 – the date of mailing – or some later date.

RCW 4.28.080(16) specifically holds that service by mail is not complete until ten (10) days after the mailing. It states (in relevant part):

> (16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing:

---

on which he or she seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force or violence, which may have accompanied the forcible entry or forcible or unlawful detainer, and claim damages therefor, or compensation for the occupation of the premises, or both; in case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. A summons must be issued as in other cases, returnable at a day designated therein, which shall not be less than seven nor more than thirty days from the date of service, except in cases where the publication of summons is necessary, in which case the court or judge thereof may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed.

[11] **(e) Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Based on the statute, Feigenbaum was not served with the pleadings until December 16 – ten days after the mailing. Because December 16 was also the return date in the Eviction Summons, Hall did not give Feigenbaum at least seven (or 10) days' notice required by RCW 59.12.070, and the court was deprived of subject matter jurisdiction.

In the trial court, Hall cited Jones v. Stebbins, 122 Wn.2d 471 (1993) for the proposition that service by mail was complete on December 6 – the date of mailing. But Hall's reliance on Stebbins is misplaced. Stebbins was decided in 1993 and is based solely on the court's interpretation of Civil Rule 4(d)(4). Id. at 476. Stebbins makes no reference to RCW 4.28.080, because when Stebbins was decided, RCW 4.28.080 did not contain subsection (16). Indeed, when Stebbins was decided, RCW 4.28.080 made no provision for service of a summons and complaint by mail. CP 844-47.

Following the Stebbins decision, the legislature revised RCW 4.28.080 to include a provision governing service of a summons and complaint by mail. The 1996 revision of the law was followed by a subsequent revision in 1997 to the statute, which included the current version of RCW 4.28.080(16). CP 848-51. When Hall mailed the Eviction Summons and Complaint for Unlawful Detainer to Feigenbaum on December 6, RCW 4.28.080(16) clearly provided that service by mail

would not be complete until 10 days after mailing, or December 16 – the return date in the Summons. Because service of the summons and complaint was not complete until the return date, Hall failed to give Feigenbaum either the seven days' notice of the return date required by RCW 59.12.070 or the 10 days' notice required by RCW 59.12.070 and CR 6(e).

RCW 4.28.080(16) was enacted after Stebbins and conflicts with the holding of Stebbins. Either the Legislature's revision to RCW 4.28.080 overruled Stebbins or the Legislature's revision to the statute should be "harmonized" with the language of CR 4(d)(4). Stebbins at 478-79, citing State v. Thomas, 121 Wn.2d 504, (1993) ("Apparent conflicts between a court rule and a statutory provision should be harmonized and both given effect, if possible.")

The holding of Stebbins creates an apparent conflict between RCW 4.28.080(16) and CR 4(d)(4), but this conflict can be harmonized by giving effect to both the statutory provisions and the language of the rule. CR 4(d)(4) itself is silent on when service by mailing is complete; the rule that service by mail is complete upon mailing was only provided by the Stebbins court's interpretation of the rule. In contrast, RCW 4.28.080(16) *explicitly* states that service by mail is complete on the 10th day after mailing. Because the statute's provision that service is

complete 10 days after mailing does not conflict with the language of the rule itself, the rule and RCW 4.28.080(16) can and should be harmonized by giving effect to both; namely:

1. Service of the original summons and complaint is complete 10 days after mailing (RCW 4.28.080(16)); and,

2. Defendant must answer the mailed complaint within 90 days after the date of mailing (CR 4(d)(4)).

Because Feigenbaum was not served with the summons until December 16 – 10 days after the date of mailing – he was not given the required seven (or 10) days notice of the return date in the summons. RCW 59.12.070. Therefore, the court was precluded from exercising its subject matter jurisdiction over the unlawful detainer proceeding.

Because this issue involves the court's subject matter jurisdiction, it is reviewed *de novo*.

**7. The issuance of a preliminary injunction 21 days after a TRO, without any findings of fact or conclusions of law, and without any bond requirement was error.**

For the reasons stated in Section IV, 3(a) above, the court lacked authority to issue a preliminary injunction as part of the unlawful detainer proceedings. This issue is reviewed *de novo*.

In addition, the Temporary Restraining Order and Order to Show Cause issued on December 1 was not personally served on Feigenbaum but instead was mailed to Feigenbaum on December 6. CP 1116-18.

Because Hall failed to extend the TRO, the TRO expired 14 days after its issuance – on December 15. CR 65(b). Because the TRO had expired on December 15, the order to appear on December 17 and show cause why the TRO "should not be continued as a preliminary injunction" (CP 1142-44) was rendered moot. Because the TRO had expired, Hall's request for a preliminary injunction was not properly before the court either at the December 17 hearing or at the continued hearing on December 22. Nevertheless, the court issued the preliminary injunction without requiring Hall to post a bond. CP 1102-03. This violated CR 65(c) and RCW 7.40.080 and was an abuse of discretion. Evar, Inc. v. Kurbitz, 77 Wash.2d 948, 950-951(1970). The preliminary injunction was also issued without any findings of fact or conclusions of law; this also was an abuse of discretion. Kucera v. State, Dept. of Transp. 140 Wash.2d 200, 218 (2000).

On March 15, 2011, Feigenbaum filed a motion to require the court to set a bond for the preliminary injunction and a bond for the Writ of Restitution. CP 1016-18. On April 22, the court denied the motion and sanctioned Feigenbaum $600. CP 990.

This court should rule the preliminary injunction was wrongful because no findings were entered and no bond was required. The court should award Feigenbaum reasonable attorney's fees associated with this

determination on appeal. Cornell Pump Co. v. City of Bellingham, 123 Wn.App. 226, 232 (2004). The court should remand to the trial court for a determination of an award of any damages Feigenbaum suffered as a result of the preliminary injunction and reasonable attorney's fees on this issue in the trial court. CR 65(c).

**8. The ex parte issuance of the Writ of Restitution without requiring any bond was error.**

On January 7, Hall appeared *ex parte* and secured the Writ of Restitution. CP 1092-1095. Hall filed no motion or declaration in support of his *ex parte* request. The Writ terminated Feigenbaum's rights to possession of the premises under the lease. Because Feigenbaum had previously appeared and opposed the entry of the Writ of Restitution, he should have been given notice and an opportunity to appear at the hearing. The failure to provide him with such notice violated Civil Rule 5, Civil Rule 6(d), WCCR 77.2, as well as Feigenbaum's due process rights under the 14th Amendment of the U.S. Constitution and Article 1, Section 3 of the Washington Constitution.[12] Because Feigenbaum did not

[12] Procedural due process constrains governmental decision making that deprives individuals of liberty or property interests within the meaning of the due process clause. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). An essential principle of due process is the right to notice and a meaningful opportunity to be heard. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). A meaningful opportunity to be heard means '"at a meaningful time and in a meaningful manner."' Mathews, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). The United States Supreme Court "consistently has held that some form of hearing is *required* before an individual is finally deprived of a

receive the notice required by the civil rules and by the state and federal constitutions, the court should vacate the Writ of Restitution and find that it was wrongfully issued.

RCW 59.12.090 requires a landlord to post a bond before any Writ of Restitution can be issued.[13] Because Hall did not post a bond, the trial court abused its discretion when it issued the Writ of Restitution. IBF, LLC v. Heuft, 141 Wn.App. 624, 636 (2007).

This court should award Feigenbaum reasonable attorney's fees associated with this determination on appeal. Cornell Pump Co. v. City of Bellingham, 123 Wn.App. 226, 232 (2004). The court should remand to the trial court for a determination of an award of damages associated with the wrongful issuance of the Writ of Restitution as well as an award of reasonable attorney's fees associated with this issue in the trial court.

**9. The court erred when it ruled that the unlawful detainer proceeding automatically converted to an ordinary civil action once the Writ of Restitution issued.**

---

property interest." Mathews, 424 U.S. at 333; see also, Staley v. Staley, 15 Wn.App. 254, 256-257 (1976)

[13] "The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall issue prior to judgment the plaintiff shall execute to defendant and file in court a bond in such sum as the court or judge may order, with sufficient surety to be approved by the clerk, conditioned that the plaintiff will prosecute his or her action without delay, and will pay all costs that may be adjudged to defendant, and all damages which he or she may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out."

Unlawful detainer actions are brought pursuant to RCW 59.12.030, which provides generally for a summary proceeding to determine the right of possession as between landlord and tenant. The action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent. Munden v.Hazelrigg, 105 Wn.2d 39, 45 (1985). In general, counterclaims and other claims are not permitted. The only exception are counterclaims or defenses which excuse the tenant's alleged default that gave rise to the unlawful detainer proceeding. Munden at 45. Otherwise, the court lacks jurisdiction to hear the other claim unless and until it converts the unlawful detainer proceeding into an ordinary civil action. Munden at 45-46. Courts may only convert the unlawful detainer proceeding into an ordinary civil action if the issue of possession of the premises is not longer an issue. See, Munden, *supra,* (tenants voluntarily vacated the leased property after landlord initiated the unlawful detainer action) and Angelo Property Co. v. Hafiz, 274 P.3d 1075, 818, (2012) (tenant voluntarily relinquished his right to possession and stipulated that the tenancy was terminated).

Hall filed his complaint as one for unlawful detainer and never amended the complaint to add other claims. On January 20, 2012, the court announced that the case had already converted into an ordinary civil action by virtue of the Writ of Restitution being issued.

> THE COURT: I have read all the materials you have submitted. Let me first say I don't need argument on this issue. This was originally an unlawful detainer action, Mr. Evans, and once the writ of restitution is issued then it's converted, it is converted into a civil action with the parties here contesting at the time what's owed, they go up and they get a trial date and the conversion takes place. So I do consider this to the extent if there hasn't been something in the record, if something is needed in the record, fine, you can submit its. But it is a civil case.

VRP (January 20, 2012) at 3. An order to this effect was entered on February 10, 2012. CP 257-259. Regardless of this conversion, Hall never amended his complaint to add additional claims, and Feigenbaum never asserted counterclaims.

Unlike the tenants in Munden and Angelo Property, Feigenbaum never relinquished his claim to possession of the premises or stipulated that the tenancy was terminated. On the contrary, Feigenbaum argued that the trial court lacked jurisdiction over the unlawful detainer proceedings and asked the court to vacate the Writ of Restitution. CP 333-38, 384-93, 786-95, and 963-75.

Because Feigenbaum never relinquished his claim to possession of the premises, the court lacked authority to convert the special unlawful detainer proceeding to an ordinary civil action. Munden, above.

More fundamentally, the case could not convert into an ordinary civil action, because the only issues before the court were those addressed by the unlawful detainer proceeding. Feigenbaum did not assert counterclaims, and, as discussed in Section 10 below, Hall's remaining

claims for damages, costs and reasonable attorney's fees were limited by and to those available in the unlawful detainer proceeding. RCW 59.12.170.

**10. The court erred when it awarded damages for rent under the lease for the time period after Hall regained possession of the premises through the Writ of Restitution.**

A tenant who fails to pay rent as required by a lease is in breach of contract and subject to a claim of damages for unpaid rent. Under the common law, the landlord in such a situation only has the right to terminate the lease for nonpayment of rent if the lease itself grants him the right of termination.

> When the tenant defaults in a duty to pay rent, the landlord may choose among several common law and statutory remedies. The first one is a common law action for damages for breach of covenant. It should be kept in mind that under the common law concept that covenants of a lease are independent, the tenant's failure to pay rent does not give the landlord a ground to terminate; termination is possible only if the lease has a termination clause or if the landlord chooses to use the statutory unlawful detainer remedy.

William B. Stoebuck and John Weaver, *"Remedies for rent default,"* 17 Washington Practice Series. §6.44.

In this case, the parties' lease did give the landlord the contractual right to terminate the lease. The relevant contractual provision is at Paragraph 21, which states (with emphasis added):

> 21. DEFAULT AND RE-ENTRY. If Lessee shall fail to keep and perform any of the covenants and agreement herein contained, and such failure continues for twenty (20) days after written notice from Lessor, unless appropriate action has been taken by Lessee in good faith to cure such failure, **Lessor may terminate the Lease and re-enter the Premises, <u>or</u> Lessor may, without terminating**

> **this Lease, re-enter said Premises, and sublet the whole or any part thereof for the account of the Lessee upon as favorable terms and conditions as the market will allow for the balance of the term of this Lease** and Lessee covenants and agrees to pay to Lessor any deficiency arising from a re-letting of the Premises at a lesser amount than herein agreed to. Lessee shall pay such deficiency each month as the amount thereof is ascertained by Lessor.

Thus, Hall could have sought the *contractual* remedy of terminating the lease. In order to do so, Hall would have had to sue Feigenbaum for breach of contract, and, if Feigenbaum refused to vacate the premises, pursued an ejectment action.

> In addition to the common law and statutory remedies for default in rent, leases often give landlords remedies, including a power of termination. When the landlord has a power of termination and exercises it in the manner described in the lease after a rent default, the tenant's leasehold ends, so that further possession is wrongful. At that point it is clear the landlord may maintain a statutory action for ejectment under either of two Washington statutes. [RCW 7.28.010 and 7.28.250]

Stoebuck, *supra*, §6.44.

In this case, Hall did not choose to pursue his contractual remedies of breach of contract and ejectment. Instead, Hall chose to pursue the statutory remedy of an unlawful detainer proceeding. By so choosing, Hall avoided the delay associated with a breach of contract and ejectment action and regained possession of the premises through the expedited procedures of the unlawful detainer and writ of restitution statutes. By so choosing, Hall also terminated the lease by operation of unlawful detainer statute.

> Summary eviction statutes, which in Washington are called unlawful detainer statutes, may be looked upon as providing a landlord a statutory means to terminate a tenancy before its normal end. At common law, since the covenants

> of a lease were viewed as independent of each other, neither party's breach of a covenant entitled the other to rescind or otherwise to terminate, in the absence of a termination clause. **However, statutory unlawful detainer as it exists under statutes in the American states modifies the common law; upon certain tenant breaches, by following the statutory procedures, the landlord may terminate**.

William Stoebuck, *Unlawful detainer as a means of termination—In general"* 17 Washington Practice Series § 6.79 (emphasis added).

This issue involves the trial court's interpretations of RCW 59.12.170 and the parties' contract, both of which are reviewed *de novo.*

**a. The lease terminated once Feigenbaum failed to comply with Hall's 3-Day Notice to Pay or Vacate and was placed in the status of being in unlawful detainer.**

The purpose of the unlawful detainer statute is to provide the landlord with a speedy mechanism for terminating the lease and quickly regaining possession of the premises. In order to take advantage of the statute, the landlord must take statutory steps to put the tenant in the status of being in unlawful detainer of the premises. RCW 59.12.030 outlines the various alternative means of putting the tenant in this status.[14]

In this case, Hall utilized RCW 59.12.030(3) and attempted to serve Feigenbaum with a 3-Day Notice to Pay Rent or Vacate on or about

---

[14] One should think of "unlawful detainer" as being a status in which a tenant is wrongfully occupying, *i.e.*, unlawfully detaining, the premises. The tenant comes into that status after he has acted wrongfully in some way described in the statute, after the landlord gives whatever statutory notice is required, and after the tenant fails to cure the wrong (if it is curable) or to vacate within the time described in the notice. Only after that should we say the tenant is "in unlawful detainer."

Stoebuck, *"Unlawful detainer under RCWA Chapter 59.12,"* 17 Washington Practice Series. §6.80.

November 5, 2010. Assuming *arguendo* that Hall's service of the 3-Day Notice was effective, Feigenbaum assumed the status of being in unlawful detainer when he failed to pay rent within four days of the notice, because service of the notice was not made in person but was mailed. RCW 59.12.040. At that point in time – on November 10, 2010, or after the three-day (plus one) notice period expired – the lease terminated by operation of the unlawful detainer statute. At that point in time, Feigenbaum's status changed from that of a person in lawful possession of the premises to that of a person "in unlawful detainer" of the premises. Because Hall chose to convert Feigenbaum's status from that of a tenant in breach of the lease to that a person in unlawful detainer of the premises, Hall is not entitled to collect damages from Feigenbaum for unpaid rent for the balance of the lease term.

**b. Because Hall pursued the unlawful detainer proceeding, Hall is only entitled to recover unpaid rent for the time period before effective date of the 3-Day Notice and damages for the time period that Feigenbaum unlawfully detained the premises. Hall is <u>not</u> entitled to recover rent for the balance of Feigenbaum's lease term.**

Under the unlawful detainer statute, the landlord can seek to recover any past-due rent – as of the date the tenant assumed the status of being in unlawful detainer – plus damages for being in wrongful detention of the premises. A landlord who pursues an unlawful detainer

proceeding is not entitled to recover lost rent for the balance of the tenant's lease term, because the unlawful detainer proceeding itself terminates the lease; the balance of the lease term – and any obligation to pay rent for the balance of the term — is terminated.[15]

When a lease is terminated, all liability for unaccrued rent ends. Heuss v. Olson, 43 Wash.2d 901, 905, 264 P.2d 875 (1953); Restatement (Second) of Property § 12.1 comment *i,* at 390–91 (1977). Because Feigenbaum's failure to comply with Hall's 3-Day Notice to Pay or

---

[15] Assuming the landlord prevails upon trial, in addition to restitution of the premises and recovery of costs, he is entitled to recovery of "any rent due" plus "damages occasioned to the plaintiff by ... unlawful detainer." [RCWA 59.12.170] **Of course the "rent" portion of the judgment is only for rent that was in arrears.** It does not include rent that was paid or, according to one decision, for which the tenant had given a promissory note. [Lochridge v. Natsuhara, 114 Wash. 326, 194 P. 974 (1921) (rent paid); Walker v. Myers, 166 Wash. 392, 7 P.2d 21 (1932) (promissory note)] **Moreover, the "rent" portion is only for rent that is in arrears up to the time the notice to quit became effective or up to the time prior to that at which the tenant vacates.** For instance, with a three-day notice, "rent" will be due no more than three days after the notice was served and not for any period of time after that, even if the tenant has wrongfully remained in possession beyond that point. [Owens v. Layton, 133 Wash. 346, 233 P. 645 (1925)] **The reason "rent" ends when the notice is effective is that the lease terminates at that point; after that the tenant is wrongfully in possession as an unlawful detainer but not as a tenant under the lease. For wrongful detention after that point, the landlord is entitled to "damages," which are measured, not by the contract rent, but by the fair rental value of the premises.** [Owens v. Layton, 133 Wash. 346, 233 P. 645 (1925)]

Stoebuck, *"Unlawful detainer under RCWA Chapter 59.12,"* 17 Washington Practice Series §6.80 *(emphasis added).*

Vacate had the effect of terminating the lease, Hall is barred from recovering rent for any time period after November 9, 2010. [16]

**c. RCW 59.12.170 mandates that the court terminate the lease for nonpayment of rent and does not permit the court either to order the tenant to pay rent for the balance of the lease term or to award damages for any time period after the tenant no longer unlawfully detains the premises.**

An unlawful detainer action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent. Kessler v. Nielsen, 3 Wn.App. 120, 472 P.2d 616 (1970); First Union Mgmt., Inc. v. Slack, 36 Wn.App. 849, 679 P.2d 936 (1984). In an unlawful detainer action, the trial court must either (1) enter a judgment in favor of defendant by dismissing the action with prejudice, or (2) render a judgment in favor of the plaintiff pursuant to RCW 59.12.170. Sundholm v. Patch 62 Wash.2d 244, 246, 382 P.2d 262, 263 (1963)

In Sundholm the plaintiff initiated the lawsuit as an unlawful detainer proceeding, and defendant counter-claimed seeking specific performance of an oral agreement to purchase the property in question.

---

[16] Feigenbaum is unaware of a Washington case that defines when a lease "terminates" in an unlawful detainer proceeding. Stoebuck argues that termination takes place once the tenant is placed in the status of being in unlawful detainer. *See footnote 15.* At the very latest, termination must take place by the time the writ of restitution is issued and the landlord regains possession of the premises; in this case, that took place on January 7, 2011. CP 1064-66. Using either termination date – November 9, 2010 or January 7, 2011, the trial court's award of damages was error.

After a trial, the court dismissed the plaintiff's unlawful detainer claim with prejudice and granted defendant's request for specific performance of the oral contract. The Supreme Court upheld the trial court's dismissal of the unlawful detainer proceeding but overturned the trial court's judgment on specific performance. It held that because the case began as unlawful detainer action, the trial court only had the authority to render judgment authorized by RCW 59.12.170. Id. at 246.

RCW 59.12.170 mandates that the superior court terminate the lease if it finds that there has been a default in the payment of rent as defined by the statute. Furthermore, the statute only authorizes the court to order (1) Feigenbaum to pay rent that was in arrears at the time of the 3-Day Notice to Pay or Vacate, and (1) to pay double damages for the time period during which Feigenbaum was in unlawful detainer of the premises.[17]

---

[17] **Judgment--Execution**

> If upon the trial the verdict of the jury or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, **or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease, agreement, or tenancy.** The jury, or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due.

RCW 59.12.170 does not authorize the trial court to award any damages associated with the balance of the lease term or the time period after the tenant relinquishes possession of the premises. Sprincin v. Sound Conditioning, 84 Wn.App. 56, 63-64 (1996) ("In an unlawful detainer action, the jury must determine the rent owed (for the period before the three-day notice expired) . . . and also the "damages" resulting from unlawfully detaining the premises.") Because Hall chose to pursue this action as an unlawful detainer proceeding, he has no claim for damages for the time period after he regained possession of the premises – January 7, 2011.

**d. The "damages" associated with unlawfully detaining the premises is based on the fair market rental value of the premises – not the rent contained in the terminated lease.**

Because the unlawful detainer proceeding terminates the lease, the damages for being in unlawful detainer is based on the fair market rental value of the premises unlawfully held – not the lease's rent rate. Sprincin, at 63 ("The measure of "damages" for unlawful detainer is based on the fair market value of the use of the premises.")

As stated above, Feigenbaum assumed the status of being in unlawful detainer of the premises on November 10, 2010, when he failed

to comply with Hall's 3-Day Notice to Pay or Vacate (which was served on November 5). He remained in unlawful detainer of the premises until January 7, 2011, when Hall regained possession of the premises through the Writ of Restitution. For that time period – November 10, 2010 to January 7, 2011 — Hall's claim for damages is limited to the fair market rental value of the premises – not the parties' lease rate for the premises. Sprincin, *supra.*

**e. Even if the court were to find that Hall can still pursue a claim under the lease, it must also find that Hall has no claim for damages after January 7, 2011, because Hall pursued the contractual remedy of terminating the lease.**

The parties' lease at paragraph 21 gave the landlord two contractual remedies:

> [1] Lessor may terminate the Lease and re-enter the Premises, or
> [2] Lessor may, without terminating this Lease, re-enter said Premises, and sublet the whole or any part thereof for the account of the Lessee upon as favorable terms and conditions as the market will allow for the balance of the term of this Lease and Lessee covenant to and agrees to pay to Lessor any deficiency arising from a re-letting of the Premises at a lesser amount than herein agreed to.

CP 1171. For the reasons stated above, Hall chose to pursue neither of these contractual remedies but instead pursued an unlawful detainer proceeding. But even if this court were to find that Hall pursued his rights under the lease, it has to conclude also that the contractual remedy that Hall sought was terminating Feigenbaum's lease – not subletting the premises on the tenant's account.

First, pursuing an unlawful detainer proceeding – instead of a breach of contract and ejectment proceeding – is by definition terminating the lease. Had Hall wanted to pursue his contractual right to sublet the premises on the tenant's account, he would have had to pursue a complaint for breach of contract– not a complaint for unlawful detainer.

Second, Hall's Complaint for Unlawful Detainer (RCW 59.12) asks the court to terminate the lease:

> WHEREFORE Plaintiffs pray for judgment against Defendants as follows:
>
> 1. That Defendants be found guilty in unlawful detainer and Defendants' tenancy in the described premises be terminated.

CP 1162. The Complaint does not ask the court to eject Feigenbaum from the premises; the Complaint does not ask the court to authorize Hall to sublet the premises to a new tenant.

Third, Hall did not in fact sublet the premises to a new tenant. Instead, Hall entered into an entirely new lease with a new tenant for a term of years that extends until August 31, 2016 – three years past the end of Feigenbaum's term. CP 179-92, 1167-75. Because Hall did not abide by the terms of the lease covenant (did not sublet for balance of Feigenbaum's term), Feigenbaum is not obliged to pay any deficiency.

Fourth and finally, Hall's re-letting the premises for a different term to the new tenant also had the effect of terminating Feigenbaum's lease.

> To mitigate, the landlord must notify the original tenant that he intends to re-let for the tenant's account and must make reasonable efforts to do so. [citation omitted] **However, the landlord is in a ticklish spot, for if in re-letting he acts contrary to the continued existence of the original lease, he will accept back for his own account and will work a termination.** For instance, though there seems not to be a Washington decision on the point, decisions from other jurisdictions have held that if the landlord re-lets for a term that extends beyond the end of the original tenant's term, this works a termination.[ W. Stoebuck & D. Whitman, Law of Property § 6.82 (3d ed. 2000).]

Stoebuck, *"Termination by Surrender,"* 17 Washington Practice Series, §6.86 (emphasis added).

**11. The court erred in awarding Hall damages for the cost of re-letting the premises.**

The court awarded Hall damages of $6,822.29 for the cost of re-letting the premises. CP 141-44. RCW 59.12.170 does not authorize recovery for the cost of re-letting. Moreover, the parties' lease does not specifically authorize this recovery. Instead, paragraph 21 of the lease, *supra*, only authorizes the landlord to recover any deficiency in rent payment in the event of the tenant's default. CP 1171.

Had Hall sued for breach of contract, he might have had a claim for these costs as consequential damages for breach of contract. However, as noted above, Hall terminated the lease when he pursued the case as an unlawful detaining proceeding. Because Hall terminated the

RESPECTFULLY SUBMITTED this 7th day of November, 2012.

BROWNLIE EVANS WOLF & LEE, LLP

By: _____

Murphy Evans, WSBA #26293
230 E. Champions Street
Bellingham, WA 98225
(360) 676-0306
Attorneys for Feigenbaum

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

| | |
|---|---|
| ROBERT K. HALL, a single man and DAYLIGHT PROPERTIES, LLC., a Washington limited liability company,<br><br>Resp/Cross App,<br><br>and<br><br>MATTHEW FEIGENBAUM,<br><br>Appellant/Cross Resp. | No.: 68727-1-I<br>Whatcom Cty No.:10-2-03030-8<br><br>PROOF OF SERVICE |

HAYLEE J. HURST DECLARES AS FOLLOWS:

1. I am a paralegal with Brownlie Evans Wolf & Lee, LLP, am over the age of 18, am not a party to the within action, and make this declaration based upon personal knowledge and belief.

2. On the date set forth below, I served the following documents in the manner noted, on the party listed below:

1. Appellant Feigenbaum's Appeal Brief, and

2. Proof of Service

Douglas K. Robertson
Belcher Swanson Law Firm PLLC
900 Dupont Street
Bellingham, WA 98225

☒ By hand-delivery

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 8th day of November, 2012 at Bellingham, Washington.

Haylee J. Hurst